

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARK HOFFMAN, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

HEARING HELP EXPRESS, INC.,
TRIANGULAR MEDIA CORP.,
LEADCREATIONS.COM, LLC and LEWIS
LURIE,

Defendants.

NO. 3:19-cv-05960-MJP

**PLAINTIFF'S MOTION TO COMPEL
THE CONTINUED DEPOSITION OF
RICHARD CALLIGAN**

**NOTE ON MOTION CALENDAR:
January 29, 2021**

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I. INTRODUCTION

Plaintiff Mark Hoffman respectfully moves for an order compelling Defendant Hearing Help Express to produce corporate witness, Richard Calligan, to give continued deposition testimony regarding campaign codes that Hearing Help failed to disclose, let alone produce, prior to Mr. Calligan's deposition on July 30, 2020. Hearing Help's campaign codes distinguish between calls it made to existing customers, and sales calls to new leads. Discovery regarding the codes is relevant to class certification because Hearing Help asserts it has an established business relationship ("EBR") defense with respect to calls it made to existing customers. As a result of Hearing Help's failure to timely disclose the campaign codes, Plaintiff had no opportunity to ask Mr. Calligan questions regarding their meaning and their connection to Hearing Help's EBR defense. Yet, Hearing Help refuses to produce Mr. Calligan for a continued deposition to address these issues. Plaintiff asks that the Court direct Hearing Help to produce its designee on a date between February 11 and 19, prior to the February 25 deadline for Plaintiff to move for class certification.

II. STATEMENT OF FACTS

A. Hearing Help asserts that it has an EBR defense for some of the calls it made.

Hearing Help is a business that uses telemarketing to sell hearing aids. Hearing Help makes its own telemarketing calls with leads it purchases from third parties. *See, generally*, ECF 114. Plaintiff alleges that Hearing Help violated the TCPA when it placed automated calls to numbers that were assigned to cellular telephone services without the requisite consent and to numbers that were listed on the National Do Not Call ("DNC") Registry. *Id.* Hearing Help has asserted several affirmative defenses. As to calls made to numbers listed on the DNC Registry, Hearing Help alleges that liability is diminished or barred under the "established business relationship" ("EBR") exception for calls made to existing customers. *See* ECF 50, ECF 82 (Eighteenth Affirmative Defense).

B. Hearing Help claimed initially to have no documents to support its EBR defense.

Plaintiff served Hearing Help with written discovery requests designed to elicit evidence regarding Plaintiff's claims and Hearing Help's affirmative defenses. Relevant to Hearing Help's EBR defense, Plaintiff requested documents "setting forth the meaning of codes utilized ... by [Hearing Help's] equipment and/or software." Declaration of Adrienne D. McEntee ("McEntee Dec."), Ex. 1 (RFP 14). Such codes routinely pertain to the purpose of the calls, frequently identifying calls made to existing customers for whom Hearing Help may assert an EBR defense. Hearing Help answered that it "has no responsive documents." *Id.* Plaintiff also requested documents "demonstrating that Plaintiff or any Person to whom telemarketing calls were made in order to sell Your goods or services had an established business relationship with You before receiving the calls made to them." *Id.* (RFP 44). In response, Hearing Help lodged objections, but did not state whether documents exist or are being withheld as required by Fed. R. Civ. P. 34(b)(2)(C). *Id.*

C. Hearing Help's corporate designee testified, contrary to Hearing Help's prior representations, about campaign codes that might support an EBR defense.

On July 30, 2020, Hearing Help produced Richard Calligan, one of its corporate designees, to testify regarding several topics, including (a) the dialing system Hearing Help used to place calls to Plaintiff and proposed class members, (b) the purpose of calls placed using the dialing system, (c) the reporting capabilities of the dialing system, including the calling details that are stored about each call, and (d) the manuals, data specifications, operator instructions, user guides, and other technical documentation regarding the dialer. McEntee Dec., Exs. 2-3. Despite Hearing Help's prior representation that it had no responsive documents relating to codes used with its dialer, Mr. Calligan testified that not only do such codes exist, they are instrumental in identifying the purpose of the calls, including whether calls are made to existing customers. Specifically, Mr. Calligan testified that the name of the campaign "would tell [him] if it was a sales call to a lead or a customer service call or a call to somebody in [Hearing Help's] customer database." McEntee Dec. Ex. 4 at 36:5-20.

1 Mr. Calligan was able to provide examples of three campaign codes—RAID, INQR,
 2 and BATO—that “off the top of my head” indicate persons already in Hearing Help’s database.
 3 McEntee Dec., Ex. 4 at 36:21-37:4. But that was the extent of Mr. Calligan’s preparation.
 4 Although designated to testify about the details of each call, Mr. Calligan was not prepared to
 5 testify regarding the full range of campaign codes:

6 Q. And these three specific names that you listed,
 7 are they written down somewhere in a list that can be
 8 produced?

9 A. Possibly. I mean, I guess, I don't know -- I'm
 10 sorry, I don't know if there's a specific list that defines
 11 each campaign name.

12 Q. I'm not asking for that. I mean, you said that
 13 you can assume that the campaign names are associated with
 14 campaigns that were called by outbound sales reps unless
 15 they fall under some specific naming conventions, correct?

16 A. Yes.

17 Q. You've given us three, and I'm trying to
 18 understand if there are more. And if there are more, is
 19 there a list somewhere that would tell us what they are?

20 A. I would have to look at the entire list and
 21 specifically curate them out.

22 *Id.* at 39:13-40:3.

23 **D. Plaintiff reserved his right to continue Mr. Calligan’s deposition.**

24 Because Mr. Calligan could not provide the information for which he was designated, at
 25 the end of the deposition, Plaintiff “reserve[d] the right to continue” the deposition, noting
 26 “there were a couple of questions that we’d ask[ed] the witness that we thought the witness
 27 would be able to answer and wasn't able to and so it sounds like maybe there's some additional
 work for Hearing Help to do in that regard....” McEntee Dec., Ex. 4 at 59:18 to 60:1.

E. Post-deposition production and meet and confer efforts.

On November 20, 2020 and December 16, 2020, months after Mr. Calligan’s
 deposition, Hearing Help eventually produced documents containing the campaign codes.

McEntee Dec. ¶ 6. They did not come in the form of a list. *Id.* Instead, Plaintiff’s counsel culled through millions of calling records to find 83 distinct campaign codes. *Id.* Plaintiff has since issued interrogatories to Hearing Help for information regarding the codes. *Id.*, Ex. 5. But Plaintiff has never had the opportunity to question Mr. Calligan or any other designee regarding their meaning. To date, Plaintiff has no way to distinguish calls Hearing Help made to existing customers from solicitation calls to new leads. On December 11, 2020, Plaintiff’s counsel asked Hearing Help to make Mr. Calligan available for a short deposition in order to ask questions about the campaign codes. McEntee Decl. ¶ 8. When Hearing Help did not respond, Plaintiff’s counsel reiterated his request. *Id.* On January 8, 2021, Hearing Help declined to make Mr. Calligan available. *Id.*

III. AUTHORITY AND ARGUMENT

Parties may obtain discovery regarding any matter “that is relevant to any party’s claim or defense and proportional to the needs of the case” Fed. R. Civ. P. 26(b)(1). The party resisting discovery bears a heavy burden of showing why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). This extends to depositions. When a party receives a Rule 30(b)(6) deposition notice, it must designate a knowledgeable person to fully prepare and “unevasively answer questions about the designated subject matter.” *Bd. of Trs. of the Leland Stanford Junior Univ. v. Tyco Int’l Ltd.*, 253 F.R.D. 524, 526 (C.D. Cal. 2008) (internal quotations omitted). “[B]ecause Rule 30(b)(6) explicitly requires a company to have persons testify on its behalf as to all matters reasonably available to it, ... the Rule ‘implicitly requires persons to review all matters known or reasonably available to [the corporation] in preparation for the [Rule] 30(b)(6) deposition.’ ” *Id.*

A. Hearing Help’s campaign codes are relevant to its EBR defense.

The DNC provisions of the TCPA create a private right of action for any “person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the [TCPA] regulations.” 47 U.S.C. § 227(c)(5). Calls are not

1 actionable, however, if a seller has an established business relationship with a person. *See* 47
 2 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(c)(2), (f)(5). An established business relationship may
 3 arise after an individual makes a purchase, inquiry, or application for products or services and
 4 lasts for a certain number of months. *Id.* Whether a call recipient has an existing business
 5 relationship with a defendant is an affirmative defense to the TCPA. *See United States v. Dish*
 6 *Network, LLC*, No. 093073, 256 F. Supp. 3d 810, 2017 WL 2427297, at *87 (C. D. Ill. Jun. 5,
 7 2017) (“The Established Business Relationship exception is an affirmative defense”); *Charvat*
 8 *v. Home Depot U.S.A., Inc.*, No. 1:17-CV-01446-ELR, 2017 U.S. Dist. LEXIS 227309, at *6
 9 (N.D. Ga. Nov. 6, 2017) (same).

10 Evidence pertaining to the EBR defense is relevant to class certification. *Sobol v.*
 11 *Imprimis Pharm.*, No. CV 16-14339, 2017 WL 5035837, at *1 (E.D. Mich. Oct. 26, 2017)
 12 (compelling documents supporting defendant’s established business relationship defense).
 13 Courts routinely certify TCPA classes in which defendants assert EBR or consent defenses
 14 because evidence regarding these issues is “easily manageable.” *Krakauer v. Dish Network*
 15 *L.L.C.*, 311 F.R.D. 384, 400 (M.D.N.C. 2015) (certifying class of individuals whose phone
 16 numbers were registered on the DNC registry despite argument that individualized issues
 17 relating to EBR predominate); *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-CV-
 18 6314-YGR, 2017 WL 1806583, at *7 (N.D. Cal. May 5, 2017), *amended sub nom.*, 2018 WL
 19 558844 (N.D. Cal. Jan. 25, 2018) (certifying DNC class after excluding individuals in records
 20 showing they had contacted defendant about products and services); *see also Manno v.*
 21 *Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 689-90 (S.D. Fla. 2013) (certifying
 22 TCPA class after excluding “any persons who may have been subject to an individualized
 23 consent defense” because they communicated with defendant prior to telemarketing calls).

24 Here, Richard Calligan testified that Hearing Help uses campaign codes to help it
 25 identify whether a particular call “was a sales call to a lead or a customer service call or a call
 26 to somebody in [Hearing Help’s] customer database.” McEntee Dec., Ex. 4 at 36:5-20. Hearing
 27

1 Help has produced records that include for each call the campaign name associated with the
 2 call. *Id.* ¶ 6. With information tying the campaign codes to calls made to existing customers,
 3 Plaintiff will be able to distinguish calls that were made for purpose of sales from those made
 4 to existing customers, and to exclude the latter at class certification. Hearing Help has refused,
 5 however, to produce Mr. Calligan to testify about the meaning of the codes. Because this
 6 testimony is critical to manageability at class certification, Plaintiff's motion should be granted.

7 **B. The Court should direct Hearing Help's designee to testify about campaign codes**
 8 **that Hearing Help did not produce (and denied existed) before the first deposition.**

9 Courts "must allow additional time consistent with Rule 26(b)(1) and (2) if needed to
 10 fairly examine the deponent or if the deponent, another person, or any other circumstance
 11 impedes or delays the examination." Fed. R. Civ. P. 30(d)(1). The Court has permitted
 12 additional deposition testimony when, as here, the party deposed produced relevant documents
 13 after the deposition has already taken place. *See Isilon Systems, Inc. v. Twin City Fire Ins. Co.*,
 14 2012 WL 503852 at * 4 (W.D. Wash. 2012) (J. Pechman) (holding that production withheld
 15 until after depositions "justifies continued depositions"). Here, Plaintiff requested codes used
 16 with Hearing Help's dialer and Hearing Help claimed that none existed. This was not true.
 17 Going into Mr. Calligan's deposition, Plaintiff did not know that a comprehensive set of
 18 campaign codes existed. He did not know that Hearing Help used those codes to distinguish
 19 between calls it made for the purpose of sales and calls to existing customers. And he did not
 20 know that the codes, which had never been produced, would bear directly on Hearing Help's
 21 EBR defense. In short, Hearing Help's misrepresentations placed Plaintiff at a significant
 22 disadvantage.

23 Even if Hearing Help had produced the codes beforehand, Mr. Calligan was nonetheless
 24 ill-prepared to testify about them. Though Mr. Calligan was able to identify three campaign
 25 codes, they were "off the top of [his] head" and he admittedly had not done the exhaustive
 26 work to curate a list. McEntee Dec., Ex. 4 at 37:2-3. As a result, Plaintiff had no opportunity to
 27 depose Hearing Help about the complete set of campaign codes. In fact, Hearing Help *never*

1 did the work to curate the list. Plaintiff's counsel did the work, which led to a comprehensive
 2 list of 83 codes. McEntee Dec. ¶ 6. Now that Plaintiff has done the work, Plaintiff should have
 3 the opportunity to depose Hearing Help regarding the complete set of campaign codes, their
 4 meaning, and their connection to Hearing Help's EBR defense.

5 IV. CONCLUSION

6 Hearing Help should have disclosed that campaign codes existed, and produced those
 7 codes, prior to Richard Calligan's July 30, 2020 deposition. Because the company instead
 8 played fast and loose with its discovery obligations, Plaintiff's counsel had no reason to believe
 9 the codes existed at Mr. Calligan's deposition, let alone documents they could have used and
 10 asked about during the deposition. The campaign codes and their meaning are critical to
 11 identifying which of Hearing Help's calls were made to new leads, and which were made to
 12 existing customers. The purpose of the calls is important both to class certification and at trial.
 13 The Court should direct Hearing Help to produce its designee for a continued deposition on
 14 these issues on a date between February 11 and 19, prior to Plaintiff's February 25 deadline to
 15 move for class certification.

16
 17 RESPECTFULLY SUBMITTED AND DATED this 14th day of January, 2021.

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